STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals

BARBARA CORNELIUS and
GERALD CORNELIUS,

Plaintiffs/Appellees,

vs.

K. M. JOSEPH, M.D.; BLUE WATER VASCULAR CLINIC, and ST. JOHN HEALTH SYSTEM,

Defendants/Appellants.

Supreme Court No. 123765
Court of Appeals No. 237956
Lower Court No. 99-002403-NH
Judge: Daniel J. Kelly

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DEFENDANTS/APPELLANTS' BRIEF ON APPEAL

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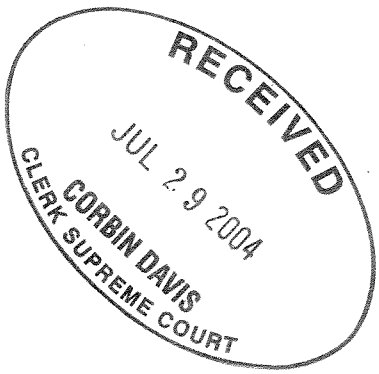

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QUESTIONS PRESENTED

I.

DID THE COURT OF APPEALS CLEARLY ERR IN RULING THAT A FAILURE TO OBTAIN INFORMED CONSENT CONSTITUTES BATTERY, RATHER THAN MALPRACTICE?

Defendants/Appellants answer "Yes."

Plaintiffs/Appellees would answer "No."

II.

DID THE THE COURT OF APPEALS COMMIT CLEAR ERROR BY FAILING TO RULE THAT ANY POTENTIAL CLAIM FOR BATTERY WAS BARRED BY THE TWO (2) YEAR STATUTE OF LIMITATIONS FOR BATTERY. MCL 600.5805(2).

Defendants/Appellants answer "Yes."

Plaintiffs/Appellants would answer "No."

III.

DID THE COURT OF APPEALS CLEARLY ERR IN ITS RELIANCE UPON IN RE ROSEBUSH TO ANALYZE PLAINTIFF'S CLAIM OF FAILURE TO OBTAIN INFORMED CONSENT?

Defendants/Appellants answer "Yes."

Plaintiffs/Appellees would answer "No."

IV.

DID THE COURT OF APPEALS CLEARLY ERR IN REVERSING THE TRIAL COURT'S RULING DISMISSING PLAINTIFF'S CLAIM OF FAILURE TO OBTAIN INFORMED CONSENT BY ADOPTING AN ACCRUAL DATE AND STANDARD OF PRACTICE THAT WAS CONTRARY TO THE APPLICABLE STATUTES AND CASE LAW, AND WHICH WAS NOT SUPPORTED BY QUALIFIED EXPERT TESTIMONY.

Defendants/Appellants answer "Yes."

Plaintiffs/Appellees would answer "No."

V.

DID THE COURT OF APPEALS CLEARLY ERR BY INTERJECTING CLAIMS AND ISSUES THAT WERE NOT PRESERVED FOR APPEAL?

Defendants/Appellants answer "Yes."

Plaintiffs/Appellees would answer "No."

JURISDICTIONAL STATEMENT

Defendants-Appellants, K. M. JOSEPH, M.D., BLUE WATER VASCULAR CLINIC and ST. JOHN HEALTH SYSTEM, file this Brief within fifty-six (56) days of the Court's Order dated June 3, 2004, granting their timely Application for Leave to Appeal pursuant to MCR 7.302(C)(2). The Application for Leave to Appeal was filed within 21 days of the April 8, 2003 Order Denying Rehearing of the February 21, 2003, unpublished decision of the Michigan Court of Appeals (Cornelius v Joseph, ____ Mich App _____, No. 237956). The Court of Appeals Opinions affirmed in part, reversed in part, the September 28, 2001 Order of Daniel Kelly, St. Clair County Circuit Court, granting Defendants' Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and (10), disposing of all claims. The trial court's reasons for granting Defendants' motion were stated in its Ruling dated September 7, 2001. In an Order dated October 24, 2001, the trial court denied Plaintiffs' Motion for Rehearing and Reconsideration. Plaintiffs filed a Claim of Appeal to the Court of Appeals within 21 days of that Order.

STANDARD OF REVIEW

This Appellate Court Reviews Grant or Denial of Summary Disposition de novo to determine if the moving party is entitled to Judgment as a matter of law. In making this determination, the Court reviews the entire record to determine whether Defendant was entitled to Summary Disposition. Groncki v Detroit Edison, 453 Mich 644, 649; 557 NW2d 289 (1996).

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendants/Appellants seek reversal of that portion of the Court of Appeals' unpublished Opinion of February 21, 2003, reversing the Trial Court's grant of summary disposition pursuant to MCR 2.116(C)(7) and MCR 2.116(C)(10), with respect to Plaintiffs' claim for negligent failure to obtain informed consent.

Dr. Joseph is a board-certified general surgeon on staff at Port Huron Hospital and Port Huron Mercy Hospital. 56 year old Barbara Cornelius was referred to Dr. Joseph by her family doctor, Dr. Hyslop, for complaints of bilateral leg pain and swelling.

Dr. Joseph first saw Plaintiff on April 9, 1996. At that time, he ordered a venous duplex Doppler to rule out deep vein thrombosis (DVT).

Plaintiff returned for a follow-up visit on April 11, 1996, where she received the test results from the duplex Doppler, which indicated no evidence of DVT. In correspondence to Dr. Hyslop dated April 11, 1996, Dr. Joseph indicated that he advised Plaintiff of leg elevation to reduce swelling and pain. (Appendix, page 28 A).

Plaintiff followed up with Dr. Joseph six months later, on October 17, 1996. At that visit, Plaintiff continued to complain of bilateral leg pain, along with varicose veins, and bilateral tenderness. Dr. Joseph ordered another Doppler study, which again showed no DVT, however, on physical examination he noted absent pedal pulses.

On a follow-up visit of October 23, 1996, Dr. Joseph performed an arterial Doppler which revealed diffuse atherosclerosis. Treatment therapies were discussed, including sclerotherapy of Plaintiff's varicose veins to relieve her symptoms of swelling and pain. The sclerotherapy involved saline injections to breakdown and dry up the varicose veins.

In a letter to the file dated October 26, 1996, Dr. Joseph noted that the patient came to his office complaining of pain, tenderness and swelling of both legs, and that in lieu of surgical intervention, the patient has chosen a conservative treatment in the form of sclerotherapy. Furthermore, Dr. Joseph's note indicates that the treatment is not cosmetic, but is strictly prophylactic as an alternative to surgery. The sclerotherapy is described as treatment of the long and short saphenous veins over a course of 15-20 visits. (Appendix, page 29 A).

Plaintiff returned for treatment on October 28, 1996. Defendant's records contain a consent form bearing Plaintiff's signature dated October 28, 1996. The form indicates that the complications for sclerotherapy include DVT and infection. (Appendix, page 30 A). While Plaintiff denies signing a consent form or otherwise being advised of the risks of the procedure, Plaintiff's expert, Dr. Heiskell, testified that if Plaintiff was presented with the form, and given an opportunity to review and sign it, then the form was adequate to provide informed consent for sclerotherapy. (Appendix, page 40 A).

Plaintiff underwent a course of weekly sclerotherapy treatments from October 28, 1996 through March 13, 1997. Dr. Joseph did not undertake any other course of treatment for the Plaintiff. (Appendix, page 42 A). Dr. Heiskell testified that although it is better to do so, in this case, where there was ongoing treatment, the standard of care did not require Dr. Joseph to get consent each time Plaintiff returned for treatment. (Appendix, page 40 A).

Plaintiff, Barbara Cornelius alleged that Dr. Joseph failed to obtain informed consent, because he did not advise her of the risk of infection associated with sclerotherapy injections. Plaintiff made this allegation despite the fact that she is a

practicing licensed practical nurse (LPN) who: (1) gives injections; (2) has known since nursing school that you can get an infection from an injection, and; (3) tells her patients that the injections she is about to give them might hurt or get sore or swell up on them. (Appendix, page 312 A). In addition, although Plaintiff claimed to have not been provided with any information about the potential risks and hazards associated with sclerotherapy, she testified that Dr. Joseph told her that she was going to have pain when he was injecting into her feet, and one of the doctor's assistants told her that it was not uncommon to experience swelling at the time of the injections, with Plaintiff already knowing that she could experience swelling, pain and bruising (as well as infection) from an injection. (Appendix, page 312-319 A).

Between October 28, 1996 and March 13, 1997, Plaintiff presented herself to Dr. Joseph's office on 14 separate occasions to undergo sclerotherapy. Plaintiff's presence at each visit was completely voluntary. Plaintiff was awake and un-sedated during each treatment, and at no time did she voice any objection to Dr. Joseph performing the treatment.

Dr. Joseph's notes from March 24, 1997 indicate that Plaintiff has cellulitis on right leg, for which he prescribed Tetracycline and Silvadene ointment. Plaintiff returned on April 7, 1997. At that time, Dr. Joseph noted that there was cellulitis on Plaintiff's right leg which still appeared to be infected, so he ordered an antibiotic, Keflex. (Appendix, page 31 A).

Plaintiff was scheduled for a return visit on April 14, 1997, however, she never returned to Dr. Joseph's office. Instead, she went to see her dermatologist, Dr. Pelachyk. Dr. Pelachyk noted a 1.4 x .6 cm superficial ulceration on Plaintiff's leg. (Appendix, page

32 A). Dr. Pelachyk treated the ulceration in the office, and gave Plaintiff follow-up instructions regarding wound care. (It should be noted that Plaintiff is an LPN who works in a skilled care nursing facility, and should be very knowledgeable regarding treatment of superficial wounds.)

Plaintiff did not return for further treatment with Dr. Pelachyk. Instead, she sought treatment with another vascular surgeon, Dr. Hussain. On April 25, 1997, Dr. Hussain saw the Plaintiff and ordered Jobst stockings. Plaintiff followed up with Dr. Hussain on May 2, 1997. At that visit, Dr. Hussain noted that the wound was slow healing. On Plaintiff's final visit to Dr. Hussain's office on May 13, 1997, he referred Plaintiff to a plastic surgeon, Dr. Rene Smit. (Appendix, page 34 A). Plaintiff testified that during these visits, Dr. Hussain was critical of Dr. Joseph's use of sclerotherapy to treat her condition.

Plaintiff first saw Dr. Smit on May 22, 1997. At that time, Dr. Smit noted that the ulceration measured 1 cm x 5 mm. Plaintiff indicated to Dr. Smit that the ulceration was about the size of a quarter, but that it was now half that size. Dr. Smit wanted to take a wait and see attitude regarding treatment of the ulceration. (See, Exhibit I).

Dr. Smit next saw Plaintiff on June 5, 1997. At that time, the doctor noted that the ulceration had significantly granulated itself closed. When Plaintiff returned one week later on June 13, 1997, Dr. Smit noted that the ulcer had almost epithelialized. In a follow-up visit of July 29, 1997, Dr. Smit noted that the area had fully epithelialized, and that she wished to see the Plaintiff in four months. (Appendix, page 35 A).

Plaintiff returned to Dr Smit on December 8, 1997. At that time, Dr. Smit noted that there was a significant induration, or hardening, of the area. Dr. Smit asked Plaintiff to return in eight months' time. (Appendix, page 35 A).

Plaintiff returned to Dr. Smit's office on August 24, 1998. At that time, Plaintiff's scar was measured at 1.8 x 1.0 cm. Plaintiff advised Dr. Smit that she wanted an excision of the area, despite Dr. Smit's note that it will produce a significantly longer scar. (Appendix, page 35 A).

Dr. Smit performed the excision and reconstruction on September 10, 1998, one and a half years after Plaintiff last treated with Dr. Joseph. In her History and Physical and Operative Report, Dr. Smit notes that no guarantee was given to Plaintiff regarding the quality of the scar. Plaintiff tolerated the procedure well and aside from suture removal, has had no further follow-up treatment. (Appendix, page 35 A).

Defendant received Plaintiffs' Notice of Intent dated October 14, 1998, setting forth various claims against the Defendants. (Appendix, page 48-49 A). On August 31, 1999, Plaintiffs filed their Complaint with accompanying Affidavit of Merit of Dr. Heiskell. (Appendix, page __ A).

At his deposition on July 11, 2001, Plaintiff's standard of care expert, Dr. Andrew Heiskell, testified that his criticisms in this case relate to informed consent and use of sclerotherapy to treat leg pain. (Appendix, page 44 A). Dr. Heiskell was of the opinion that plaintiff developed an ulceration, which is a common complication of this procedure that can happen to anyone. (Appendix, page 42-43 A). Moreover, Dr. Heiskell did not believe Dr. Joseph was negligent in administering the injection that caused the ulceration, nor was Dr. Heiskell critical of Dr. Joseph's treatment of the ulceration. (Appendix, page 43 A).

Defendants' filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and (C)(10) on July 26, 2001. Defendants argued in their motion that they were entitled to summary disposition as there was no genuine issue of material fact that Plaintiffs' claims

were barred by the statute of limitations. In support of this argument, Defendants relied upon the testimony of Plaintiffs' standard of care expert, Dr. Heiskell, who testified that his criticisms in the case related to Dr. Joseph's failure to obtain informed consent prior to initiating sclerotherapy treatments on October 28, 1996, as well as Dr. Joseph's choice of sclerotherapy to treat Plaintiff's complaints of leg pain. (Appendix, page 40-41 and 44 A). More importantly, Defendants cited Dr. Heiskell's testimony that he was not critical of Dr. Joseph's technique in performing sclerotherapy on March 13, 1997, indicating that ulcerations are a common complication of sclerotherapy that can occur with anyone, and that he was not critical of Dr. Joseph's treatment of Plaintiff's ulceration. (Appendix, page 42, 43 -44 A).

Relying on the testimony of Plaintiffs' expert, Defendants argued that Plaintiffs' claims of negligence for failure to obtain informed consent and failure to elect an alternative course of treatment to sclerotherapy accrued on or before October 28, 1996, the date of Plaintiff's first sclerotherapy treatment with Dr. Joseph. In support of this argument, Defendants cited MCL § 600.5805(1),(6), and MCL § 600.5838(a)(1), which state that a plaintiff has two years from the act or omission that is the basis of the medical malpractice claim to bring an action, or the action is barred by the statute of limitations.

Furthermore, Defendants cited the case of McKiney v Clayman, 237 Mich App 198; 602 NW2d 612 (1999), for the proposition that the existence of a continuing physician-patient relationship does not, by itself, extend the accrual date beyond the specific, allegedly negligent act or omission charged. To change the accrual date, Plaintiffs must allege a new, distinct negligent act or omission, not a "continuing wrong" or mere adherence to the original mis-diagnosis and treatment determination. Id. at 207-208.

Applying these legal principles to the facts of the case, Defendants' motion argued that summary disposition was required under MCR 2.116(C)(7) and (C)(10), as there was no genuine issue of material fact that Plaintiffs' claims were barred by the applicable statute of limitations. It was Defendants' argument that the accrual date for Plaintiffs' claims of negligent selection of a course of treatment in sclerotherapy and failure to obtain informed consent prior to initiating treatment was no later than October 28, 1996. Plaintiffs had two (2) years from that date to commence their action. Defendants acknowledged Plaintiffs' service of a Notice of Intent dated October 14, 1998 (fourteen days before the expiration of the two year statute of limitations), that tolled the limitations period until April 13, 1999. Thereafter, Plaintiffs had until April 27, 1999 to file their Complaint. However, it was Defendants' argument that Plaintiffs filed their Complaint on August 31, 1999, 125 days after the limitations period expired.

Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Disposition argued that Barbara Cornelius was never informed of the risks and complications associated with sclerotherapy. This argument was irrelevant, as Defendants assumed for the purposes of their motion that informed consent had not been provided. Plaintiffs' second argument was that McKiney, supra, did not support the Defendants' position.

Plaintiffs' Brief did not address Defendants' argument that the date of accrual for Plaintiffs' claim of negligent selection in course of treatment in sclerotherapy accrued on or before October 28, 1996. Nor did Plaintiff's Brief address Defendant's argument that, according to Dr. Heiskell, the Plaintiffs' claim for failure to provide informed consent accrued on before the first treatment on October 28, 1996, and that the standard of practice did not require Dr. Joseph to obtain renewed informed consent prior to each

treatment session. Finally, Plaintiff's Brief did not rebut the argument that Dr. Heiskell failed to find that the complication that arose out of treatment on March 13, 1997 was the result of negligence by Dr. Joseph.

At oral argument on August 20, 2001, Plaintiffs again failed to rebut Defendants' argument that their claim for negligent selection of a course of treatment in sclerotherapy was barred by the statute of limitations. Instead, Plaintiffs' counsel attempted to focus the Trial Court's attention on the non-issue of whether or not her client gave informed consent to sclerotherapy. Plaintiffs' counsel kept returning to this non-issue, even when specifically asked by the Trial Court to address the statute of limitations:

> THE COURT: What about the statute of limitations issue?
>
> MS. GRICIUS: Well, the statute of limitations is fine as far as Plaintiff is concerned because the date of the alleged act of negligence is March 13th. It's not October 28th.
>
> THE COURT: Why not - why not when they began the program of therapy that he initiated, he wouldn't need to get consent after that began?
>
> MS. GRICIUS: He never got consent. He did not get consent in October. He did not get consent in March. It never occurred. I have -- they produced this consent form that they said was signed by my client in October of 1996. She reviewed that. There is an affidavit in my response stating that she never signed that. Now, during the deposition, I find it very strange that opposing counsel cannot produce that informed, that consent form to have her look at her. She testified that the risks and complications were never explained. The statute of limitations, the date of the alleged occurrence accrual date is March, not October, '96. It's March 13, '97. So, we are well within the statute of limitations for filing this claim. (Appendix, page 287-288 A).

Later in the hearing, the Trial Court, again, attempted to have Plaintiffs' counsel address the issue of the statute of limitations for the claim of lack of informed consent:

> THE COURT: So then informed consent is the issue then? Are you saying that is the last date of treatment because there never was informed consent at any point?
>
> MS. GRICIUS: Never. That was the date that she had a severe reaction. That was the date in which she suffered the ulceration as a result of the doctor's treatment. His whole motion, as you know, is based on the fact of this informed consent that he has produced, which we say she never signed and she's testified to that. And I never received it when I first ordered records. (Appendix, page 295 A).

In responding to the Trial Court, Plaintiffs again failed to address the testimony of their own expert witness that Dr. Joseph breached the standard of practice if he did not obtain informed consent prior to initiating sclerotherapy, and that the standard of practice did not require Dr. Joseph to obtain informed consent prior to each treatment. Furthermore, the Trial Court's inquiry that informed consent was "the issue" highlighted Plaintiffs' failure to present any rebuttal to Defendants' argument that Plaintiffs' claim for negligent selection of a course of treatment in sclerotherapy was barred by the statute of limitations.

According to MCL § 600.5838a(1), a claim based upon medical malpractice accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time plaintiff discovers or otherwise has knowledge of the claim. Plaintiffs' vascular surgery expert, Dr. Heiskell, testified that Dr. Joseph did not undertake any other course of treatment for Plaintiff after his decision on October 26, 1996 to perform sclerotherapy. (Appendix, page 42 A). Dr. Heiskell testified that the standard of practice required Dr. Joseph to obtain informed consent prior to initiating sclerotherapy treatments on October 28, 1996, and that with this type of treatment, the standard of practice did not

require the doctor to obtain a separate consent each time thereafter that the Plaintiff presented for treatment. (Appendix, page 40 A).

On September 7, 2001, the Trial Court issued its ruling, granting Defendants' motion. (See, Exhibit M). Under the facts of the case, the Court found that Plaintiffs' claim for lack of informed consent and failure to suggest an alternative form of treatment accrued no later than October 28, 1996. Additionally, the Court held that Plaintiffs failed to submit factual testimony that the March 13, 1997 medical procedure and resulting ulceration represented a breach of the applicable standard of care, as Plaintiffs' expert could not state whether the technique employed was appropriate or inappropriate. The Court concluded that because Plaintiffs' informed consent claim was time-barred and there was no evidence of negligence relating to the March 13 1997 procedure, the Court was granting summary disposition pursuant to MCR 2.116(C)(7) and (C)(10). (Appendix, page 3-4 A). An Order Granting Defendants' Motion for Summary Disposition was entered September 28, 2001. Plaintiffs filed a Motion for Rehearing or Reconsideration on October 12, 2001. The Court entered an Order Denying Plaintiffs' Motion for Rehearing and Reconsideration on October 24, 2001. (Appendix, page 6 A).

Plaintiffs appealed as of right to the Court of Appeals, raising all of the same arguments they did at the trial court level. Plaintiffs' counsel did not appear for oral argument in the Court of Appeals. The Court of Appeals issued an unpublished decision affirming the trial court's ruling with respect to Plaintiffs' claims regarding negligent selection of a course of treatment in sclerotherapy, as well as negligent performance of the sclerotherapy injections on March 13, 1997. (Appendix, page 7-10 A).

The Court of Appeals affirmed the Trial Court's ruling that the claim for negligent selection of treatment was barred by the applicable statute of limitations, adopting the Trial Court's argument that, under McKiney, supra, and MCL 600.5838a(1), the choice of treatment using sclerotherapy took place no later than October 28, 1996, with Plaintiff citing no evidence that the March 13, 1997 treatment was anything other than implementation of the original treatment selection. The Court of Appeals also affirmed the Trial Court's ruling that Plaintiffs had failed to create a genuine issue of material fact with respect to the claim of negligent performance of sclerotherapy on March 13, 1997, as there was no expert testimony establishing that Defendant Joseph's technique in performing the injections on that date deviated from an appropriate standard of care. (Appendix, page 8-9 A).

However, the Court of Appeals reversed the Trial Court's ruling that Defendants' claim for failure to obtain informed consent for the March 13, 1997 treatment was barred by the statute of limitations. The Court of Appeals ruled that the Defendants' failure to obtain informed consent constitutes battery, and that an alleged failure to obtain informed consent prior to the initial treatment does not eliminate the need for obtaining the patient's informed consent before subsequent treatments. The Court of Appeals concluded that, in the absence of finding that Plaintiff gave a proper informed consent, the Trial Court erred as a matter of law in ruling that Plaintiffs' informed consent claim based on the March 13, 1997 treatment, was time-barred. (Appendix, page 9 A).

The Court of Appeals ruling with respect to the informed consent claim failed to distinguish between claims of battery, which arise out of a lack of consent to undergo medical treatment, as was the case in the Court of Appeals cited decision of In Re Rosebush, 195 Mich App 675, 491 NW2d 633 (1992), and medical malpractice actions

arising out of a claim of lack of informed consent for failure to reasonably inform the plaintiff of the potential risks and hazards that may follow medical treatment. See, Roberts v Young, 369 Mich 133; 119 NW2d 627 (1963). Failure to obtain informed consent is a form of professional negligence, and not a battery. See Michigan Civil Jury Instruction 30.02. A claim of lack of informed consent is one of medical malpractice, and is subject to the statutory requirements regarding accrual (MCL 600.5838a) and expert testimony (MCL 600.2169 and 600.2912a).

The Court of Appeals ruling on the applicable statute of limitations for Plaintiffs' claim for failure to obtain informed consent is completely results oriented. In its ruling, the Court of Appeals fails to apply to the informed consent claim the very same statutory requirements for medical malpractice actions that it applied to Plaintiffs' other claims. If the Court did so in the mistaken belief that this claim was not one of malpractice, but battery, the Court was clearly in error. If the Court simply chose to ignore the statutory requirements applicable to malpractice actions, that was clear error, also. The Court of Appeals' ruling is perplexing, because the Court agrees with the Trial Court's ruling that the doctrine of "continuing-wrong" does not apply to extend the statute of limitations for Plaintiffs' claim of negligent selection of sclerotherapy, however, it rejects the same argument with respect to the claim of failure to obtain informed consent prior to the initial treatment. Instead, the Court of Appeals creates its own standard of practice, unsupported by qualified expert testimony, that creates a "continuing-wrong" or "continuing treatment" rule for claims of failure to obtain informed consent.

Defendants timely filed an Application for Leave to Appeal to this Court, arguing that this Court should grant the Application and reverse the Court of Appeals ruling with respect

to the claim of lack of informed consent, because the Court of Appeals decision is based upon an erroneous finding that a failure to obtain informed consent constitutes a battery. The Court of Appeals also erred in adopting of a standard of practice for informed consent that was not supported by statutorily required qualified expert testimony, and by interjecting claims and issues that were not preserved for appeal, because they were not raised at the trial court level. MCR 7.210. In granting Defendants' Application for Leave to Appeal, the Supreme Court requested that Defendants address application of the two year statute of limitations for claims of battery.

ARGUMENT

I.

THE COURT OF APPEALS CLEARLY ERRED IN RULING THAT A FAILURE TO OBTAIN INFORMED CONSENT CONSTITUTES BATTERY, RATHER THAN MALPRACTICE.

On page 3 of its Opinion, the Court of Appeals states that a physician who fails to obtain informed consent commits a battery. The Court's ruling is clearly erroneous, because it mis-states Michigan law.

Roberts v Young, 369 Mich 133; 119 NW2d 627 (1963), involved a claim of lack of informed consent very similar to this case. Mrs. Roberts filed suit alleging that the defendant doctor had committed malpractice by failing to advise her of the possibility that infection might follow from her undergoing a caesarian section. Id. at 135. The Court distinguished plaintiff's claim that the defendant doctor failed to advise her of a mere possibility of infection from those cases where a doctor fails to advise a patient about the existence of a condition that the doctor knew about (e.g., a foreign body left in the patient following surgery). Id. at 139. The Court held that a claim for failure to advise the patient of a possible result of surgery is a matter to be determined in accordance with general practice customarily followed in the community by practitioners in good standing in the defendant doctor's school of treatment:

> Counsel for plaintiffs assert as a possible basis of liability the failure of defendant [Dr.] Young to advise Mrs. Roberts that infection might follow from an operation of the character that plaintiff sought to have performed. . . . In the instant case we are not dealing with a known existing condition but, rather, with a mere possibility that infection might follow the operation. No claim is made that defendant Young had knowledge, or believed, that such would be the case. The question presented is in substance whether a physician and surgeon before operating should advise the patient of all *possible* results.

> Whether such should be done would seem to be a matter to be determined with reference to the general practice customarily followed by the medical professional in the locality. . . . As before indicated, whether such possibility should have been discussed with the patient is a matter to be determined in accordance with general practice customarily observed by practitioners in good standing of defendant Young's school of treatment. (Roberts, supra, at 139-140)

The Court's ruling in Roberts served as the model for the Standard Jury Instruction on informed consent, M. Civ. JI 30.02, which states:

> Negligence may consist of the failure on the part of the [name profession] to reasonably inform [name of plaintiff] of risks of hazards which may follow the [treatment/services] contemplated by the [name profession]. By "reasonably informed" I mean that the information must have been given timely and in accordance with the accepted standard of practice among members of the profession with similar training and experience in [this community or a similar one/[name particular specialty.]].

Roberts, supra, is still good law, having recently been cited in the case of Paul v Lee, 455 Mich 204, 211; 568 NW2d 510 (1997). In Paul, supra, the plaintiff alleged that the defendant doctor had failed to obtain informed consent for a vasectomy, because the doctor did not advise plaintiff of the risks of failure and the need for postoperative follow -up testing. Id. The Court held that claims of negligence based on failure to obtain informed consent come within the general rule regarding the need for expert testimony. Id. at 212 -213.

Therefore, Plaintiffs' claim of failure to obtain informed consent is one of professional negligence or medical malpractice, not battery. As a result, the claim is subject to a medical malpractice claim's statutory requirements regarding: the applicable statute of limitations (MCL 600.5805(6), accrual of claims (MCL 600.5838a) and expert

testimony (MCL 600.2912a and 600.2169). The Court of Appeals clearly erred by characterizing this case as one involving a battery.

II.

THE COURT OF APPEALS CLEARLY ERRED BY NOT RULING THAT ANY POTENTIAL CLAIM FOR BATTERY WAS BARRED BY THE TWO (2) YEAR STATUTE OF LIMITATIONS FOUND IN MCL 600.5805(2).

For the reasons set forth in Argument I, above, Defendants deny that Plaintiff has a viable cause of action against Dr. Joseph for battery. Furthermore, even if Plaintiff had a viable claim for battery, that claim is barred by the statute of limitations.

The applicable statute of limitations for a claim of battery is two (2) years from the date the claim first accrues. See MCL 600.5805(2). In Lemmerman v Fealk, 449 Mich 56, 63-64, 534 NW2d 695 (1995), the Court held that, pursuant to MCL 600.5827, a claim of assault and battery accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." The court went to hold that the assaults on the Plaintiff inflicted immediate damage, and that subsequent damage arising after the initial assaults would not give rise to a new cause of action or renew the running of the limitation period. Id. at 64.

Applying the Court's ruling in Lemmerman, supra, to the facts of this case, if Plaintiffs had pled claims of battery, the last possible accrual date for that claim occurred on the last date that Dr. Joseph performed sclerotherapy - March 13, 1997. Plaintiffs' had two (2) years from that date, or until March 13, 1999, to commence an action by filing a Complaint for battery. Plaintiff did not file her complaint until August 31, 1999, over five (5) months after the limitations period had expired. Therefore, even if Plaintiff has a claim of

battery against Dr. Joseph, the limitations period for that claim expired prior to the filing of Plaintiff's Complaint.

III.

THE COURT OF APPEALS CLEARLY ERRED IN ITS RELIANCE UPON IN RE ROSEBUSH TO ANALYZE PLAINTIFFS' CLAIM OF FAILURE TO OBTAIN INFORMED CONSENT.

The Court of Appeals' Opinion reversing the Trial Court's ruling dismissing Plaintiff's claim of lack of informed consent relies solely upon the case of In Re Rosebush, 195 Mich App 675; 491 NW2d 633 (1992). In Re Rosebush, supra, involved a petition to allow discontinuance of artificial means of life support for a child in a persistent vegetative state. The case did not involve the issue of a physician's liability for failure to obtain informed consent, but rather the guardian of the comatose minor's right to remove life-support as an aspect of the common law doctrine of informed consent without having to subject that decision to prior judicial review. Id. at 680 and 687.

The Court of Appeals cited In Re Rosebush, supra, for the proposition that "if a physician treats or operates on a patient without consent, the physician has committed a battery." (See, Exhibit O, p. 3). Like Rosebush itself, all the cases cited therein involve situations involving a lack of consent for medical treatment. See, Zoski v Gaines, 271 Mich 1; 260 NW 99 (1935) (surgery on child without consent of parents or guardians); Young v Oakland General Hospital, 175 Mich App 132; 437 NW2d 321 (1989) (blood transfusion of Jehovah's Witness without consent); and; Banks v Whittenberg, 82 Mich App 274; 266 NW2d 788 (1978) (drainage of hematoma without consent). None of these cases address issues of informed consent for failure to advise of a possible complication of a procedure.

The distinction is significant, because in a failure to obtain consent case, the plaintiff does not consent to undergo the procedure(s), which is(are) done either without their knowledge, or in direct contravention of their wishes. It is this non-consensual physical invasion by the physician that constitutes the battery.

In this case, Plaintiff consented to undergo sclerotherapy, and she voluntarily presented herself for treatment on fourteen occasions. Therefore, the Court of Appeals' use and reliance upon In Re Rosebush, supra, to analyze this case along the line of cases involving non-consentual medical treatment was clearly erroneous, because the law applicable to those cases is clearly distinguishable. Instead, the Court of Appeals was required to analyze this case consistent with claims of professional negligence. See Roberts, supra and Paul, supra. The Court's analysis was to include application of the relevant statutory provisions, such as the requirements for expert testimony (MCL 600.2912a, MCL 600.2169) and the malpractice statute of limitations (MCL 600.5805(6) and 600.5838a). Had the Court of Appeals applied the proper legal analysis to Plaintiffs' informed consent claim, it would have affirmed the Trial Court's ruling with respect to that claim, as well. (See, Defendants' Argument IV).

IV.

THE COURT OF APPEALS CLEARLY ERRED BY ADOPTING AN ACCRUAL DATE AND STANDARD OF PRACTICE FOR PLAINTIFF'S LACK OF INFORMED CONSENT CLAIM THAT WAS CONTRARY TO THE APPLICABLE STATUTES AND CASE LAW, AND WHICH WAS NOT SUPPORTED BY QUALIFIED EXPERT TESTIMONY.

As set forth in Roberts, supra, the issue of whether a defendant doctor committed medical malpractice by failing to obtain informed consent is to be established by expert

testimony. In this case, the Court of Appeals erred when it adopted an accrual date and standard of practice for informed consent that was contrary to the applicable statutes and not supported by Plaintiff's expert's testimony.

This is a medical malpractice action where Plaintiffs' Affidavit of Merit, signed by Dr. Andrew Heiskell, alleges that the Defendants were negligent in failing to obtain informed consent for the sclerotherapy treatment, and negligent in failing to elect a course of treatment alternative to sclerotherapy. (Appendix, page 46-47 A) Defendants accomplished Dr. Heiskell's deposition on July 11, 2001, at which time, Dr. Heiskell testified that his criticisms in this case related to Dr. Joseph's failure to obtain informed consent prior to initiating sclerotherapy treatments on October 28, 1996, and Dr. Joseph's choice of sclerotherapy to treat Plaintiff's complaints of leg pain. (Appendix, page 40-44 A) Dr. Heiskell was not critical of Dr. Joseph's technique in performing sclerotherapy, indicating that ulcerations are a common complication that can occur with anyone, nor was he critical of Dr. Joseph's treatment of the ulceration. (Appendix, page 42-44 A.)

Dr. Joseph's medical records clearly indicate that he decided on a course of treatment in sclerotherapy on or about October 26, 1996. (Appendix, page 29 A). The record is equally clear that Dr. Joseph initiated sclerotherapy on October 28, 1996. According to Dr. Heiskell, It is Dr. Joseph's alleged acts or omissions on these dates which serve as the basis for Plaintiffs' action, and it is these date which are the accrual dates for this action.

The statute of limitations for medical malpractice actions is found in MCL 600.5805(1), (6):

> Sec. 5805.(1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or someone through whom the

> plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> * * *
>
> (6) except as otherwise provided in this chapter, the period of limitations is two years for an action charging malpractice.

The statutory definition of when a medical malpractice action "accrues" is found in MCL § 600.5838a(1):

> Sec. 5838a.(1) For the purposes of this act, a claim based on the medical malpractice of a person or entity who is or who holds himself or herself out to be a licensed health professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaged in or otherwise assisting in medical care and treatment, whether or not the licensed health care professional, licensed health facility or agency, or their employee or agent is engaged in the practice of the health profession in a sole proprietorship, partnership, professional corporation, or other business entity, accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

Therefore, Plaintiff has two (2) years from the act or omission that is the basis of her medical malpractice claim (the accrual date) to bring her action, or the action is barred by the statute of limitations. MCL 600.5805(1),(6) and 600.5838a(1).

In the present case, Dr. Heiskell testified that the standard of care required Dr. Joseph to obtain informed consent prior to commencing sclerotherapy. (Appendix, page 40 A.) Accordingly, the accrual date for Plaintiffs' informed consent claim is no later than October 28, 1996, the date Dr. Joseph commenced sclerotherapy treatments. So, Plaintiff had two (2) years from October 28, 1996 to bring her action based upon a claim of lack of informed consent.

With respect to Plaintiffs' claim that Dr. Joseph should have used an alternative form of treatment, Dr. Joseph placed correspondence in his file dated October 26, 1996,

indicating his choice of a course of treatment in sclerotherapy, with treatment beginning on October 28, 1996. Accordingly, Plaintiffs' claim for negligent selection of treatment accrued no later than October 28, 1996. So, Plaintiff had two (2) years from October 28, 1996 to bring her action based upon a claim of failure to choose an alternative course of treatment.

As set forth below, the fact that Plaintiff's sclerotherapy treatment occurred over a period of months, and she does not allege a complication as a result of treatment until March 13, 1997, does not change the accrual dates of Plaintiffs' claims for failure to obtain informed consent and failure to elect an alternative course of treatment.

The issue of when a claim for medical malpractice accrues for the purposes of the statute of limitations was addressed in McKiney, supra, which involved a claim against an oral surgeon for failing to diagnose and treat a cancer of the tongue. Ms. McKiney started treating with Dr. Clayman in 1989, for sores or lesions on her tongue. Dr. Clayman did not believe that the lesions were cancerous, and engaged in a four year course of treatment which involved repeated laser surgery to remove recurring lesions. Plaintiff last visited Dr. Clayman on December 3, 1993, at which time Dr. Clayman remained of the opinion that plaintiff did not have cancer. Thereafter, plaintiff's only contact with Dr. Clayman was over the telephone, with several telephone conversations occurring between January and March, 1994. Plaintiff filed suit against Dr. Clayman on December 21, 1995. The trial court granted summary disposition based upon the two year statute of limitations, and plaintiff appealed. Id. at 199-200.

On appeal, the plaintiff in McKiney, claimed that because the plaintiff continued to receive treatment from the defendant by telephone through March 3, 1994, that date constituted the accrual of her malpractice claim. Id. at 201.

The Court in McKiney, supra, started its analysis by reviewing the statutes regarding the accrual of medical malpractice actions. MCL 600.5805(1), (6) and 600.5838a(1). The Court held that the accrual date depends upon the basis of plaintiff's allegations. The allegations set forth in Ms. McKiney's complaint were that the defendant failed to properly evaluate her condition by not diagnosing cancer, and neglected to conduct appropriate examinations and refer her to other more competent health care providers. Id., at 202. The Court could not determine from the Complaint when plaintiff alleged these claims accrued:

> Plaintiff offers no specific date on which defendant's failures allegedly occurred, but instead maintains that these failures represented ongoing deficiencies that continued until the termination date of the parties physician-patient relationship, March 3, 1994. Id. at 202.

Despite claims of ongoing deficiencies, the Court of Appeals rejected plaintiff's argument that a continuing physician-patient relationship could extend the accrual date beyond the specific, allegedly negligent act, where that would be contrary to MCL 600.5838a(1) :

> Plaintiff's position that her claim did not accrue until the end of the partes' professional relationship ignores the statutory language defining accrual as "the time of *the act or omission which is the basis for the claim.*" MCL 600.5838a(1); MSA 27A.5838(a)(1). Emphasis Added. This unambiguous language reflects the Legislature's desire to focus the accrual date of medical malpractice claims on the occasion of the act or omission complained of, and the Legislature's current rejection of the notion that the existence of a continuing physician-patient relationship by itself could extend the accrual date beyond the specific, allegedly negligent act or omission charged. Eaton Farm Bureau v Eaton Township, 221 Mich App 663, 668, 561 N.W.2d 884 (1997) (a change in statutory language is presumed to reflect a change in the meaning of the statute). Id. at 203-204.

Applying this analysis, The Court held that the accrual date for the plaintiff's claims for failure to diagnose and improper election of course of treatment was at some point prior to her first laser treatment:

> Plaintiff clearly based her malpractice claim on defendant's failure to diagnose her cancer and defendant's allegedly improper election of a course of treatment. Presumably defendant's diagnosis and treatment decisions initially occurred at some point before his first laser treatment removal in 1990 of the spot that had appeared on plaintiff's tongue. Id, at 203-204.

Moreover, the Court stated its belief that continued adherence to the same diagnosis and treatment determinations would not represent new, distinct, and separate acts or omissions. Id. at Fn 4. The Court applied that analysis to reject plaintiff's argument that subsequent telephone conversations with the defendant regarding his adherence to his original mis-diagnosis and treatment determination constituted new, distinct negligent acts or omissions:

> This testimony does not allege any new, distinct negligent acts or omissions by defendant in the early months of 1994, but indicates that defendant merely adhered to his original mis-diagnosis and treatment determination. Because defendant's mis-diagnosis or mis-diagnoses and allegedly negligent treatment decisions occurred at some point no later than December 3, 1993, over two years before plaintiff's filing of her malpractice claim on December 21, 1995, the trial court properly granted defendant summary disposition pursuant to MCR 2.116(C)(7). Id. at 207.

In conclusion, the Court in McKiney, supra, left no doubt that the continuing-wrong or continuing-treatment rule no longer applies with respect to medical malpractice action, as, to do so, would reinstate the"last-treatment rule," which was abrogated in 1986. Id. at 208.

Using the Court's analysis in McKiney, supra, Defendants argued that there was no genuine issue that they were entitled to summary disposition based upon the statute

of limitations. Dr. Heiskell limited his criticisms of Dr. Joseph to failure to obtain informed consent prior to initiating treatment and choice of treatment. (Appendix, page 44 A) Dr. Heiskell was not critical of Dr. Joseph's technique in performing sclerotherapy on March 13, 1997, testifying that ulcerations are a common complication of the procedure that can occur with anyone. (Appendix, page 42-44 A). The best testimony Plaintiffs could obtain from Dr. Heiskell was that he could not say if Dr. Joseph's technique was appropriate or inappropriate. The trial court correctly ruled that such speculation by an expert will not support a claim of negligence, citing Badalamenti v William Beaumont Hospital, 237 Mich App 278, 602 NW2d 854 (1999). (Appendix, page 4 A).

Dr. Joseph's decision regarding the course of treatment was made on October 26, 1996, and certainly no later than initiation of treatment on October 28, 1996. Dr. Joseph's alleged failure to obtain informed consent prior to initiating treatment occurred no later than October 28, 1996. Therefore, plaintiff's medical malpractice action accrued no later than October 28, 1996. Using the October 28, 1996 date as the accrual date for Plaintiffs' medical malpractice claim, Plaintiffs had until October 28, 1998, to either file their Notice of Intent, or if the Notice of Intent was filed more than six months prior thereto, to bring an action by filing their Complaint and conforming Affidavit of Merit. See, MCL §§ 600.2912b and 600.2912d. Plaintiff's Notice of Intent is dated October 14, 1998, fourteen days before the expiration of the two year statute of limitations. (Appendix, page 48 A) According to MCL 600.2912b and MCL 600.5856(d), Plaintiffs' Notice of Intent tolled the statute of limitations for a period of 182 days. Using October 14, 1998 as defendants' date of receipt of Plaintiff's Notice of Intent, the 182 day tolling period ended on April 14, 1999. Thereafter, the statute of limitations began to run again, and Plaintiffs had until April 28, 1999, to file their Complaint and Affidavit of Merit. Plaintiffs did not file their Complaint and

Affidavit of Merit until August 31, 1999, approximately 125 days after the limitations period expired. (Appendix, page 50 A) As a result, Plaintiffs; claims are barred by the statute of limitations.

Defendants' Motion for Summary Disposition relied upon the testimony of Plaintiffs' expert, Dr. Heiskell to determine the accrual date for Plaintiffs' claims of negligent selection and informed consent. Applying the expert's testimony to the applicable case law and statutory authority, Defendants argued the Plaintiffs' claim accrued, and the statute of limitations began to run, as of the date of the initial treatment. Defendants having presented proofs to support their motion, Plaintiffs, as the responding party, had an affirmative duty to respond with admissible evidence by affidavit or otherwise. See, MCR 2.116(G)(4). Plaintiffs did not submit any contradictory expert evidence in response to Defendants' motion, or as part of their motion for rehearing.

In rejecting Plaintiffs' argument of a March 13, 1997 accrual date, the Trial Court cited McKiney, supra, at 208, that the "continuing-wrong" or "continuing-treatment rule" no longer applies with respect to medical malpractice actions. The Trial Court correctly held that the injections given on March 13, 1997, were part of the same decision to undertake sclerotherapy that was made shortly before the first treatment on October 28, 1996. Moreover, the Trial Court correctly held that Plaintiffs had failed to submit expert testimony that the March, 1997 medical procedure and resulting ulceration, was the result of a new, distinct act or omission or separate course of treatment. (Appendix, page 3-4 A).

The Court of Appeals adopted the Trial Court's ruling regarding the application of the statute of limitations to Plaintiffs' claim of negligent selection of sclerotherapy, but not its ruling regarding the claim of negligent failure to obtain informed consent. The Court of Appeals' ruling, applying a different analysis to the informed consent claim is flawed,

because it ignores rulings in Roberts, supra, and McKiney, supra, at 207, that a claim of failure to obtain informed consent is a claim for professional negligence for which expert testimony is required regarding the applicable standard of practice, and that in order for there to be a new accrual date, there must be some new, distinct, and separate negligent act or omission.

In this case, there is no expert testimony of a new, distinct, and separate negligent failure to obtain informed consent after October 28, 1996. There is just a continuation of the alleged negligent failure to obtain informed consent prior to the initial treatment. As a result, Plaintiffs' claim based upon the alleged failure to obtain informed consent accrued as October 26, 1996, and the two year statute of limitations began to run as of that date. For the Court of Appeals to rule otherwise is for the Court to adopt a "continuing tort" theory that tolls the statute of limitations beyond the date of the alleged negligent act or omission, with Michigan courts not recognizing a cause of action for continuing negligence. See Travers Lakes v Douglas Company, 224 Mich App 335, 341; 568 NW2d 847 (1997).

The Court of Appeals' failure to properly analyze Plaintiffs' lack of informed consent claim as one of professional negligence, and not battery, resulted in the Court failing to enforce the statutory requirements for medical malpractice actions. Specifically, the Court failed to apply the same statutory requirements (MCL 600.5838a, 600.2912a, and 600.2169), to Plaintiffs' informed consent claim, that it applied to their other malpractice claims. The Court of Appeals was required to enforce these relevant statutes in its analysis of plaintiff's claim. As set forth in Roberts v Mecosta County General Hospital, 466 Mich 57, 63; 642 NW2d 663(2002), the foremost rule of statutory construction is that courts are to effect the intent of the Legislature. Furthermore, if the language of the statute

is clear and unambiguous, the courts are to assume that the legislature intended its plain meaning and the statute is to be enforced as written. Id. at 63.

In enacting MCL 600.5838a, the Legislature set forth its clear intention that a claim of medical malpractice "accrues at the time of the act or omission that is the basis of the claim of medical malpractice..." As discussed in McKiney, supra, at 203-204, the language of MCL 600.5838a was intended to abolish the "last treatment' rule with respect to the accrual date for medical malpractice claims. Furthermore, in enacting MCL 600.21912a(b) and 600.2169, the Legislature set forth its intention that in actions alleging medical malpractice, the plaintiff has the burden of proving by way of qualified expert testimony that the specialist failed to provide the recognized standard of practice or care within their specialty.

In this case, when it came to the informed consent claim, the Court of Appeals ignored the very same statutory requirements it readily applied to Plaintiffs' other claims. For example, the Court affirmed dismissal of Plaintiffs' claim for negligent performance of sclerotherapy, because there was no qualified expert testimony to support that claim (MCL 600.2912a and 600.2169). Nevertheless, the Court adopted multiple accrual dates for the informed consent claim, even though the testimony of Plaintiff's expert supported only a single accrual date, at the time the doctor initiated treatment. The Court of Appeals' ruling amounts to the Court adopting its own standard of practice, not supported by expert testimony. This is clearly erroneous, as the applicable case law (Roberts, supra, and Paul, supra), statutes (MCL 600.2912a and 600.2169) and the jury instructions (M. Civ. JI 30.02) require that the applicable standard of practice be supported by qualified expert testimony, with the Court of Appeals supplying its own standard, instead.

The Court of Appeals also ignored application of MCL 600.5838a and the Court's ruling in McKiney, supra, to the informed consent claim, even though the Court cited both favorably in affirming the Trial Court's ruling that ongoing treatment did not extend the accrual date for Plaintiff's claim of negligent selection of sclerotherapy. As set forth in McKiney, supra, at 203-204, the Legislature's intent in enacting MCL 600.5838a was to abolish the "last treatment' and "continuing treatment" rules relative to accrual of malpractice claims. Plaintiff's expert testified that the standard of practice required that Dr. Joseph obtain informed consent prior to initiating treatment, and that the doctor was not required to obtain a separate consent each time the patient showed up for sclerotherapy. (Appendix, page 40 A). Accordingly, if Dr. Joseph did not advise Plaintiff of the possibility that she might develop an infection from sclerotherapy prior to initiating treatment, he failed to obtain informed consent, and he could be held liable for malpractice. According to McKiney's interpretation of accrual under MCL 600.5838a, if Dr. Joseph failed to correct this omission on subsequent visits, it would be a continuation of the original tort, and not a new, separate and distinct act, with a new accrual date. The Court of Appeals' ruling is contrary to McKiney, supra, at 203-204, which held that the Legislature's intent in enacting MCL 600.5838a was to reject the notion that continuing physician-patient relationship extends the accrual date for claims beyond the date of the alleged act or omission.

The result of the Court of Appeals' erroneous ruling is that Defendant physicians are unfairly exposed to stale claims . A claim that is otherwise time-barred by virtue of Plaintiff's own expert's testimony is brought back to life by the Court's use of a variation on the long-abolished principles of continuing tort and the last treatment rule. It is also unfair that in a situation where the Plaintiffs' expert testifies that the standard of practice requires the physician to obtain informed consent once, prior to treatment, that the Court of Appeals

can create multiple subsequent accrual dates (here 13 potential dates) for an alleged negligent failure to do this single act.

V.

THE COURT OF APPEALS CLEARLY ERRED BY INTERJECTING CLAIMS AND ISSUES THAT WERE NOT PRESERVED FOR APPEAL.

The Court of Appeals' Opinion bears no resemblance to the claims and issues raised by Plaintiffs, either at the trial court level or in their Brief on Appeal. Plaintiffs' only claim in this case is for medical malpractice. There is no claim of battery. Nor was battery or In Re Rosebush, supra, raised at the trial court level in response to Defendants' motion for summary disposition, or even in Plaintiff's Brief on Appeal. As a result, the Trial court never ruled on these arguments, and Defendants were never given the opportunity to rebut these arguments The Court of Appeals' reliance upon these un-preserved claims and issues was clear error, because they were not properly preserved for appeal due to the fact that they were not raised before and addressed by the Trial Court. Etefia v Credit Technologies, Inc., 245 Mich App 466; 628 NW2d 577, 581 (2001).

The same clear error applies to the standard of practice set forth in the Court of Appeals' Opinion. Expert testimony was required with respect to the issue of the applicable standard of practice for informed consent. See, MCL 600.2912a, 600.2169 and Roberts, supra. Expert testimony was not presented by Plaintiff to either the Trial Court or the Court of Appeals that supports the Court of Appeals' standard of practice, with the appellate court limited to the record below. See MCR 7.210.

Further, Appellate Courts are not to address an issue that was not decided below, unless it is one of law for which all of the necessary facts were presented. Camden v Kaufman, 240 Mich App 389, 399; 613 NW2d 335 (2000). In this case, Plaintiff never presented the factual and legal issue of the Defendant committing a battery, and the necessary factual expert testimony was not present below to support the Court of Appeals'

ruling relative to the standard of practice. Therefore, the Court of Appeals erred in making a ruling on these issues, as they were not preserved in the Trial Court for appeal.

RELIEF REQUESTED.

For all the above reasons, Defendants/Appellants, K. M. JOSEPH, M.D., BLUE WATER VASCULAR CLINIC, and ST. JOHN HEALTH SYSTEM, ask this Court to reverse the Court of Appeals' decision reversing the Order of the Trial Court dismissing Plaintiffs' claims of lack of informed consent, but otherwise affirm the Court of Appeals Opinion affirming the Trial Court's grant of summary disposition to the Defendants. Defendants also request an award of all costs and attorneys fees they are allowed by the applicable court rules and statutes.

Respectfully submitted,

BLAKE, KIRCHNER, SYMONDS, LARSON, KENNEDY & SMITH, P.C.

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Dated: July 29, 2004
(39228\Brief on Appeal)

STATE OF MICHIGAN

IN THE SUPREME COURT

BARBARA CORNELIUS and
GERALD CORNELIUS,

Plaintiffs/Appellees,

vs.

K. M. JOSEPH, M.D.; BLUE WATER VASCULAR CLINIC, and ST. JOHN HEALTH SYSTEM,

Defendants/Appellants.

Court of Appeals No. 237956
Lower Court No. 99-002403-NH
Judge: Daniel J. Kelly

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PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF WAYNE)

Francis J. Lagrou, being first duly sworn, deposes and says that on July 29, 2004, two (2) copies of **Defendants/Appellants' Brief on Appeal** was hand delivered to: Darlene Gricius, 6230 Orchard Lake Road, Suite 294, West Bloomfield, MI 48322.

Further deponent saith not.

FRANCIS J. LAGROU

Subscribed and sworn to before
me on July 29, 2004.

MARY WOOLNOUGH
Notary Public, State of Michigan
My Commission Expires on: 9/8/04